

Croatia's Response to COVID-19: On Legal Form and Constitutional Safeguards in Times of Pandemic

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Croatia remains one of the few fortunate countries in Europe that (so far) managed to prevent the dreaded exponential rise of 'the curve'. Our [epidemiologic situation](#) of just above 2,000 infections in a country of 4 million is in no small part a result of early and restrictive measures implemented to prevent and contain the spread of SARS-COV-2. The measures range from restrictions on individuals' freedom of movement to restrictions of social and economic rights – prohibiting all public and social gatherings, closing down borders, public transport, schools and kindergartens, effectively banning all but essential commercial activities. After a 5.5 magnitude earthquake hit and significantly damaged the nation's capital Zagreb in the early morning of March 22nd, a prohibition of leaving one's place of residence was added to the list of epidemiologic restrictions aiming to prevent the massive spread of the disease to the rest of the country by people fleeing yet another natural disaster. The measures have worked. Many restrictions are now gradually being reduced, depending on current epidemiologic developments.

Analysing national responses to the coronavirus, the [University of Oxford study](#) found that Croatia was the most rigorous of all the examined countries considering the actual number of infections. This observation alone inevitably raises a question of balancing the crisis management in Croatia with public health concerns and the appropriate and necessary scope of limiting individual rights under the Constitution. Overall, the Croatian response to Covid-19 might not pose an autocratic threat to the rule of law as in certain European countries. This is far, however, from suggesting there have not been significant constitutional challenges, or that we should not require an enhanced constitutional oversight over apparently quite restrictive governmental action.

Indeed, the extent of the imposed restrictions notwithstanding, Croatian authorities refused to declare the state of emergency and legitimize their actions by the (required) 2/3 parliamentary majority when limiting individuals' constitutional rights in the event of a 'natural disaster', as stipulated in Article 17 of the Croatian Constitution. Rather, the Government relied on the existing statutory framework on civil protection and prevention of infectious diseases – coupled with significant (yet rather patchwork) legislative amendments to provide a legal basis and an institutional setting for its far-reaching measures. These two features of Croatian legal framework – one constitutional and one statutory – are central to monitor the legal aspects of combat against Covid-19 and its effects on the rule of law in Croatia. I'll start with the latter.

Re-tailoring the institutional and procedural aspects of the existing statutory framework

At the earliest stages of contemplating how to respond to the pandemic, the Croatian Prime Minister proposed a parliamentary delegation of quasi-legislative powers to the Government. This type of mechanism is in principle available under Article 88 of the Constitution, but not when it comes to limiting human rights and fundamental freedoms. The parliamentary opposition [instantly refused](#).

A compromise was found in authorizing the Civil Protection Authority – a committee composed of various representatives of the Government and national civil protection units – to make [decisions](#) introducing measures against the spread of coronavirus. In no small part because of the Authority's successful results of containing Covid-19, their continuing public presence, including during daily media conferences, and the impression of much-needed transparency in crisis governance, the public perception was initially highly supportive of their work. The dominant public narrative emphasized expertise, rather than politics in charge of the struggle against our ['invisible tiny enemy'](#). This inevitably reflected on the rising positive image of the Government.

However, the Authority's decisionmaking soon proved to be far more legally problematic than its initially positive public image would suggest. Most of their procedural missteps, described in detail below, came under public focus only after [the media discovered](#) how two experts who were initially the main public figures of the Croatian struggle against Covid-19 – our Minister of Health Vili Beroš, a respected medical doctor by profession, and the head of the country's main infectious disease hospital, Alemka Markotić – were not even members of the Authority despite representing it daily at the media conferences. This discovery incited a healthy amount of scepticism and criticism of the Authority's crisis management hiding behind the smokescreen of expertise. The result was enhanced scrutiny of the Authority's work by the public media, legal experts and the Government's political opposition alike.

The central legal problem, in a nutshell, was that the Government's delegation of powers to the Civil Protection Authority resulted in sidelining certain pre-established statutory procedures for handling infectious diseases, ultimately resulting in the need for several legislative amendments to retroactively remedy the legal mess which was thereby caused. Misrepresenting the legal framework of the Authority's actions raised concerns of illegality and a lack of legal certainty, ultimately giving a wide set of powers limiting constitutional rights to a body lacking political and democratic accountability.

Formally, the legal basis of all the Authority's decisions was traced back to Article 22a of the [Civil Protection System Act](#). This amendment of the pre-existing piece of legislation was passed through the Parliament (by an overwhelming majority of 108 to 1) a mere day before the Authority's first decision was rendered on March 19th. It provides that

‘in case of specific circumstances involving an unpredictable or uncontrollable event or state endangering the lives and health of citizens ... the Civil Protection Authority renders decisions and guidelines to be implemented by the civil protection authorities of the local and regional governments. Such decisions and recommendations are rendered to protect the lives and health of citizens ...’.

[Legal experts publicly criticized](#) the amendment for severe fundamental rights’ limitations lacking constitutionally required safeguards, also stipulating how the purpose of the Civil Protection System Act was to coordinate the hierarchy of the civil protection units on local, regional and national levels, not provide a legal basis for substantive type of measures undertaken against SARS-COV-2. And indeed, the underdetermined scope of this provision [other than that measures are implemented by regional or local units] makes the mandate given to the Authority unclear yet potentially vast.

The statutory landscape of Croatia’s response to the coronacrisis gets further complicated as the measures introduced by the Authority to contain the spread of coronavirus were nowhere prescribed as part of the civil protection system. Rather, these measures (such as quarantines and restrictions on citizens’ movement) were, substantively, part of quite another piece of legislation with an entirely different institutional set-up. Article 47 of the [Infectious Diseases Protection Act](#) provides that such epidemiologic measures are rendered by the Minister of Health on the proposal of the Croatian Institute for Public Health, not the Civil Protection Authority.

Once discovered, such disregard of the established procedural framework (or rearranging its institutional and operative setting) grew into a public scandal. As a result, the Government soon pushed the amendment of the Infectious Diseases Protection Act through the Parliament authorizing the Authority to enact epidemiologic measures ‘in cooperation’ with the Ministry of Health and the Croatian Institute for Public Health, ‘under direct supervision’ of the Government. In so doing, a number of the Authority’s decisions already issued prior to the amendment were, effectively, retroactively legitimized. This raises significant problems in light of the general prohibition of retroactive effect of legislation under Article 90 of the Constitution ‘unless for exceptionally justified reasons’, which were in the present legislative process nowhere mentioned nor justified.

Constitutional concerns and the state of emergency

In addition to the aforementioned statutory alterations, the Croatian response to Covid-19 raises several other constitutional concerns.

The central one pertains to the debate whether or not there was a need to trigger the constitutional emergency mechanism in imposing the epidemiologic restrictions. This is highly relevant as in the state of emergency, the parliamentary voting requirements and the necessary constitutional thresholds needed to justify limitations of individual rights differ from these rules under ‘normal’ circumstances.

Unlike many other national constitutions, the Croatian Constitution does not necessitate a parliamentary declaration of the 'state of emergency' or provide the Government with any emergency powers exceeding its regular mandate for as long as the Parliament is capable of assembling. Rather, its Article 17 stipulates that constitutional freedoms and rights may be restricted by the Parliament acting on a 2/3 majority in the event of a 'natural disaster' – existing as a matter of fact, not requiring a legal declaration of the 'state of emergency'. Only if the Parliament is unable to convene, which was not the case in present circumstances, such decisions are made by the President of the Republic at the proposal of the Government and co-signed by the Prime Minister.

Whether or not the Covid-19 pandemic counts as a 'natural disaster', with all the legal consequences thereof, sparked a heated debate amongst constitutional experts on [social networks](#) and in public media. Putting their differences aside, the predominant scholarly position was that all newly introduced measures limiting constitutional rights ought to be legitimized by a more protective 2/3 majority in the Parliament. As pointed out by [Gardasevic](#), crisis situations by their very nature necessitate a higher degree of consensus on the proper extent of constitutional limitations of individual liberties, exceeding the regular parliamentary majority.

The second crucial difference between the legislative process in regular and emergency situations concerns the standard of scrutiny that a given measure has to endure in order to justify limitations of constitutional rights and freedoms. Unlike the regular standard of proportionality under Article 16 of the Constitution, which requires quite a high threshold of a measure's *necessity* to achieve a legitimate aim, measures enacted in the state of emergency under Article 17 require only a standard of *suitability* to protect public health. In other words, the more stringent voting rules and parliamentary agreement allow for a lower degree of judicial scrutiny over fundamental rights' limitations in the case of emergency, when prompt action and more severe constitutional restrictions are essential to achieve an important public interest. On the other hand, when the Parliament does not act under the 2/3 majority, the standard required for a measure's constitutionality is set quite high, to a measure protecting public health in the least restrictive way possible.

Taking this into account, the constitutionality of recent statutory amendments introducing new epidemiological measures (such as self-isolation, particularly of persons suspected of infection) might be brought into question. They were all passed through a regular legislative procedure.

Even the [President of the Parliament](#) and the [President of the Republic](#) at a certain point questioned the type of majority required. The Constitutional Court, however, refused to join the debate. According to a [press statement](#) of its President, the Court considered there is no ground to intervene or assess the constitutionality of the adopted measures, invoking rules of procedure allowing decisionmaking only *post-facto* and refusing to intervene on its own motion. Quite an interesting development of this story occurred when one of the three constitutional justices who remained in minority when forming the Court's position published a journal article disclosing his distinctly opposing opinion. [Justice Abramovič](#) quite harshly argued how human rights are significantly violated under the pretence of 'caring for the nation'. He

particularly mentions the examples of circumventing legally valid statutory norms and misleading the public, the measure of prohibition of leaving one's place of residence when such measures are nowhere prescribed in legislation, and questions the proportionality and even suitability of the measure of self-isolation for close contacts of infected persons, when a less restrictive alternative to limiting individual freedoms exists in simply testing for the infection. Justice Abramovič also equates the intention of transferring unlimited powers to the Authority to the 'suspension of democracy' and a 'de facto dictatorship' – insisting how any limitations of constitutional rights and freedoms in these pandemic times should follow the established procedures and be passed through the Parliament by a 2/3 majority, not be given to unlimited discretion of governmental appointees. 'In the long term, the damage suffered by democracy is greater than the damage caused by the virus'.

The emergency voting procedures have in the Croatian Parliament never (or not yet) been activated for the measures related to Covid-19. The public debate surrounding it, however, managed to incite and successfully activate a mechanism of democratic control over a final 'epidemiologic' measure proposed, and worth mentioning in this report as perhaps most controversial from a constitutional perspective.

Democratic control

By [statutory amendments of the Electronic Media Act, the Government proposed](#) tracking cellphones for the purpose of protecting national and/or public security 'when the Minister of Health declares an epidemic of infectious disease or a threat thereof, whereby health and lives of citizens could not be effectively protected without processing such data'. This proposal was – perhaps even too obviously – an unfettered limitation of citizens' right to privacy with no safety mechanisms installed. Early in the legislative procedure, the Government's initiative was successfully blocked by amendments proposed by the opposition and heavily [criticized](#) in the media for its lack of constitutionally warranted safeguards crucial for an effective democratic oversight, including temporal or personal limitations. The proposal, at least so far, stands still in the hands of the Government and is unlikely to return – at least not in the form initially proposed.

This example, together with the continued debate on the proper parliamentary majority to limit the citizens' rights, serve to demonstrate the relative maturity of the Croatian liberal democratic system. Operating through interaction of the political process, free media and public debate, democratic checks and balances in Croatia seem to have worked, restraining the attempts of excess governmental encroachment on fundamental rights and constitutional liberties.

To that extent, the rule of law in Croatia may not be under direct threat of autocracy. This does not mean, however, that the Covid-19 pandemic is not continuously testing the constitutional limits of overreaching governmental action.

In fact, some of the most recent decisions of the Civil Protection Authority on the relaxation of epidemiologic measures have already caused new concerns. In light of the upcoming parliamentary elections, the Authority was accused of [leading the](#)

[\(centre-right\) ruling majority's political campaign](#), as they moved to allow religious services much sooner than all other social gatherings; or even prohibited Sunday work under the pretence of limiting the stores' working hours, even though such prohibitions were previously declared unconstitutional. Moreover, the Constitutional Court has already received [at least 16 motions](#) against the controversial statutory amendments or the Authority's decisions claimed as far too restrictive, failing to proportionately achieve the aim of protecting public health. These constitutional challenges of Croatian epidemiological measures will most certainly not be the last.

